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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1509

STATE OF CALIFORNIA,
Petitioner,
vs.
CLENNON WASHINGTON KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent respectfully requests that the writ of certiorari be denied in the above-entitled case.

JURISDICTION

Jurisdiction of the Court is invoked by Petitioner under Section 1257(3), 28 USCA and Rule 22 of the

Rules of the Supreme Court of the United States. Respondent denies that this Court has jurisdiction.

The judgment of the Supreme Court of California to be reviewed was filed on October 2, 1970. Petition for Rehearing was denied on October 27, 1970 (*In Re King,* 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983).

OPINION BELOW

The Petitioner persists in misunderstanding the effect of the decision of the Supreme Court of the State of California and the grounds of its decision and in effect misquotes the opinion. Accordingly, we are forced to quote the opinion directly in answer to the petition. Respondent believes that upon examination of the opinion of the Supreme Court of the State of California, this Honorable Court will determine that it has no jurisdiction under Rule 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1) Does the opinion of the State Court rest upon an interpretation of State Law and the State Constitution or does it rest upon the Constitution of the United States so as to give this Court jurisdiction under Rule 22 of the Rules of the Supreme Court of the United States?

2) Assuming for the purpose of argument that the opinion of the Supreme Court of the State of Cali-

fornia rested on the United States Constitution alone and particularly the Fourteenth Amendment thereto and Article IV, Section 2 thereof, and the Federal right to travel, is the opinion correct in holding, as follows:

(a) That statutory provisions making an act a felony or a misdemeanor depending upon absence or presence in a state is a denial of equal protection of the laws;

(b) That such a statute violates the privileges and immunities clause of the Federal Constitution, and

(c) That such a statute impinges on the Federal right to travel (which is not attached to any written section of the Constitution)?

STATUTES INVOLVED

The Constitutional and statutory provisions are set forth in Decision to be reviewed as follows:

United States Constitution, Fourteenth Amendment;

United States Constitution, Article IV, Section 2 (cited only in a footnote in the opinion);

Article I, section 11 of the California Constitution;

Article I, section 21 of the California Constitution;

California Penal Code Section 270.

It is to be noted that the Petitioner does not mention the sections of the California Constitution in this

portion of its petition and mis-cites them on page 4 of its petition.

HISTORY OF THE CASE

We do not quarrel with Appellant's statement of the history of the case or the factual statement except that we do question the Petitioner's interpretation of the holding of the California Court and thus we are impelled to state the holding of the Court verbatim.

The Court first holds that—

> "the guarantees of equal protection embodied in the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California Constitution, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction . . . . (U)nder this section as presently drafted, any father who 'remains out of the state' of California for 30 days while not supporting his child is guilty of a felony; a father who commits the identical act of criminal nonfeasance, but happens to be within California, is guilty of only a misdemeanor. The application of this distinction may often lead to what appears to be fortuitous, and even arbitrary, results . . . . To justify this seemingly illogical classification the people proffer the two broad objectives which underline the nonsupport provision generally—(1) to protect public funds from the financial burden of supporting children whose fathers are able to support them and (2) to deter fathers from subjecting their children to the adverse impact of becoming public charges. *We can discern no rational relationship, however, between these*

> *unquestionably valid general purposes and the distinguishing factor—the location of a non-supporting father—upon which the felony-misdemeanor classification turns.*" (Italics added).
>
> *In re King,* 3 Cal.3d 226, 232, 233, 90 Cal.Rptr. 15, 19-20, App. A to Petition pp. 5-7.

Immediately following this holding is the only exclusively federal ground of the decision, the Constitutional right to travel from one state to another, and the California Court clearly does not equate this right with the equal protection clause but notes on the face of its opinion that it is a right so firmly established that it finds no explicit mention in the Constitution. (*In re King,* supra, 3 Cal.3d 234, 90 Cal.Rptr. 20, App. A p. 8.)

Finally in a footnote the California Court addresses itself to the privileges and immunities clause of Article IV, Section 2 of the Federal Constitution and holds that section 270 of the California Penal Code in practice will operate to penalize out-of-state citizens more heavily than California citizens and notes that the privileges and immunities clause and the constitutional right to travel are often coincident and that at one time the privileges and immunities clause was thought to be a source of the constitutional right to travel. (*In re King,* supra, 3 Cal.3d 235, 90 Cal.Rptr. 21, App. A p. 11.)

With respect to Petitioner's statement of the facts, Respondent asserts that this Court is bound by the State of California's interpretation of Section 270 and its holding as to Petitioner's capacity to challenge the

statute since both of those matters are questions of state law and thus this Court has before it a decision of the State of California holding that a statute which makes a difference in the penalty on whether the act of nonfeasance is committed within the State of California or outside the state of California violates two Sections of the California Constitution which read as follows:

Section 11 of the California Constitution reads:

> "All laws of a general nature shall have a uniform operation."

Section 21 of the California Constitution reads:

> "No special privilege or immunity shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen or class of citizens, be granted privileges or immunities, which, upon the same terms, shall not be granted to all citizens."

ARGUMENT

1. SECTIONS 11 AND 21 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF CALIFORNIA FURNISH INDEPENDENT PROTECTION IN THE JURISDICTION OF THE STATE OF CALIFORNIA AND SUPPLEMENT THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

This Court has repeatedly made a distinction between those cases where the State Court purports to be holding on an exclusively Federal ground and those cases where the Court is interpreting its own State provisions supplementing the Federal Constitution.

In *Department of Mental Hygiene v. Kirchner,* 380 U.S. 194, 13 L.Ed. 753, 85 S.Ct. 871, this Court, in refusing to issue a writ of certiorari to determine whether a statute imposing liability upon relatives for care in State institutions was constitutional under the Federal Constitution, returned the case to the California Court for a clarification of its holding and in *Kirchner v. Department of Mental Hygiene,* 62 Cal. 2d 586, 43 C.R. 329, 400 P.2d 321, the California Court appropriately stated that Sections 11 and 21 of Article I of the California Constitution furnished independent protection in California and were the equivalent to the equal protection clause of the Federal Constitution but supplemented it. (See also *Black v. Cutter Laboratories,* 351 U.S. 292, 76 S.Ct. 824 100 L.Ed. 1188).

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 290 2 L.Ed. 1313, 78 S.Ct. 1174 (1958), relied on by Petitioner, has no application to the case at bar. There is in this case no interweaving with the Federal grounds. That case rested on the interpretation of a Federal Statute solely which the State Court erroneously interpreted. There is no question here that the State Court properly interprets its own constitution. Other cases in California which rest solely on the Federal Constitution are properly subject to writ of certiorari and have no application to the case at bar. (See for example *People v. Green,* 70 Cal.2d 654, 75 C.R. 782, reviewed in *California v. Green,* 399 U.S. 149 (sole basis of California decision, the confrontation clause of the Federal Constitution); *Byers v.*

Justice Court, 71 Cal.2d 1039, 80 Cal.Rptr. 553, reviewed May 17, 1971, *California v. Byers,* 39 U.S.L.W. 4579 (California decision based wholly on Fifth Amendment to the United States Constitution).

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2. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED IN THE DECISION OF THE CALIFORNIA SUPREME COURT OF WHICH PETITIONER SEEKS REVIEW.

a) The principle of *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, governs the case before the Court. Only when there are degrees of evil in conduct may punishments be different. There is no difference in the degree of evil of the nonfeasance of non-support whether it be within the State of California or without that State. The degree of punishment herein proposed making the difference of misdemeanor treatment or felony treatment is comparable to the sterilization procedure condemned in *Skinner v. Oklahoma,* supra. A man convicted of a felony in most states of the Union loses most, if not all, of his civil rights and the effect of such conviction follows him for the rest of his days, whereas, a misdemeanor conviction has little, if any, effect upon his future life, and, thus, it is respectfully submitted that *Skinner v. Oklahoma* controls this decision.

Likewise, it is respectfully submitted that *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1969, effectively disposes of the argument that the State of California has a compelling governmental interest which would justify the restriction imposed upon non-residents'

rights to remain non-residents by Penal Code §270. Here there is no evidence of any compelling public interest and no evidence was presented of any compelling public interest except a broad assertion that by use of this statute they might compel absent fathers to support their children. It seems clear, as was held by the Supreme Court of California, that making a father a felon in order to secure that his child is not a public charge can hardly be called a compelling public interest.

Finally, it is respectfully submitted that a parenthetical remark in a footnote, with respect to the privilege and immunities clause of the Federal Constitution, does not justify the issuance of a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for a writ of certiorari in the instant case.

Dated, Carmel, California,
June 2, 1971.

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